10 which give the Trustees powers of sale and reinvestment.

I hold that the whole estate is now vested in Palgrave Simpson and John Bernard Maxwell Wilson, the present Trustees.

Question 6 reads:—

> If the said eleventh clause creates a valid trust whether the legal personal representatives or the assigns (if any) of Hilda Isabal Mitchell Adams, Louise Constance Adelaide Hogan and Cecil James Manges Jones respectively are entitled to receive the sum of $1,000.

From paragraphs 6 and 7 of the affidavit of J. B. M. Wilson dated 6th December, 1933, it appears that Phillip Jones had five daughters and three sons, namely:—Florence Johanna Harriet Hallifax, Emily Ann Rose Jones, William P. V. Jones and Elvira Emma Marriot Adamson, Seymour Jones, Hilda Isabel Mitchell Adams, Louise Constance Adelaide Hogan and Cecil James Manges Jones and that the first four named are still alive. Seymour Jones died before 1900. The Testator made his Will in 1902 and died in 1904. Hilda Isabel Mitchell Adams, Louise Constance Adelaide Hogan and Cecil James Manges Jones died between 1904 and 1921. The Testator's widow died in 1931. The question thus arises whether the word "surviving" in clause 11 means, surviving at the date of the Testator's death or, surviving at the date of his widow's death.

In the former case the legal personal representatives of the three children of Phillip Jones who died between 1904 and 1921 would be entitled to $1,000 each out of the residue; in the latter case, they would not.

Mr. Ross, on behalf of these representatives, argued that these were gifts to a class and that the gifts vested in each of the children as tenants-in-common at the death of the Testator. In this contention he is supported to some extent by the series of earlier authorities which seem to have established that a gift to several objects as tenants-in-common and the survivors of them vested the subject of the gift absolutely in the objects living at the death of the Testator, the words of survivorship being referable to that period. But this rule of construction has been departed from in subsequent cases and, in *Cripps* v. *Wolcott*, 20 Rev. Rep. 268, Sir J. Leach, V.C., laid down an opposite doctrine. It is now clearly settled that the rule which reads a gift to survivors simply as applying to objects living at the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred; and that where such gift is preceded by a life or other prior interest it takes effect in favour of those who survive the period of distribution and of those only.

(See *Jarman* on Wills, 7th edn. vol. 3, p. 2065). The rule in *Cripps* v. *Wolcott* has been followed repeatedly and is one which the Court never seeks to evade by slight distinctions. In the words of Farwell, J. in *Re Poultney*, (1912) 2 Ch. 541 "the rule in *Cripps* v. *Wolcott* is too well settled to be whittled away now." The rule will only yield to a context clearly indicating a contrary intention and there is no such context in this Will. Indeed, the first part of clause 11 contains the words "at the demise of my wife" and it is reasonable to suppose that the intention was that the word "surviving" in the second part of the clause should refer back to these words.

I hold that the legal personal representatives of the three children named in Question 6 are not entitled.

Question 7 reads:—

> Whether interest is payable upon the sums of $1,000—payable to the sons and daughters of Philip Jones at the rate of four per cent per annum or at any other and if so what rate, as from the date of the widow's death or as from the date when the residue has been reduced to cash and is ready for distribution or from any other and if so what date or at all.

It is agreed by all parties concerned that interest is payable upon these sums at the rate of four per cent per annum as from the date of the widow's death. I hold accordingly.

Question 8 does not arise in view of my ruling on the construction of clause 11.

Order accordingly.

Solicitors for the Applicants—*Presgrave & Matthews.*

Solicitors for A. J. Drake, Administrator of Estate of Elizabeth Vermount, deceased—*Wreford & Thornton.*

Solicitors for Emily Jones—*Logan, Ross & Samuel.*

Solicitor for Florence Matilda Vermount—*Hogan & Ivens.*

[ORIGINAL CIVIL JURISDICTION]

HYNDMAN-JONES, C.J.

December 30, 1911.

T. S. AROONASALAM CHITTY.....Plaintiff

v.

SEAH ENG KOON & ANOR.....Defendants.

[SINGAPORE SUIT No. 221 of 1911]

Contract—Assignability—Promissory Note—Assignment for value.

A Promissory Note was made in favour of one S. J. W. "personally". The said Note having been assigned for value to a Chitty who sued the maker's personal representatives thereon.

Held, the debt was not assignable.

The material facts of the case and arguments are stated in the judgment.

Roland Braddell for Plaintiff.

Koek (Senior) for Defendants.

HYNDMAN-JONES, C.J. — The Plaintiff claims from the Defendants as Executors of the late Seah Song Seah the sum of $5,000 with interest at the rate of 8% from the 25th day of April, 1911, the date on which the amount became payable till payment or judgment. The Plaintiff claims as assignee of the debt from one Seah Jim Huat.

The facts are simple. Seah Song Seah on the 22nd April, 1910, appears to have signed 8 documents in the shape of Promissory Notes in favour of Seah Jim Huat. These documents were put in, and one of them evidences the amount now claimed. Seah Song Seah shortly afterwards died, and Seah Jim Huat by a Memorandum of Agreement dated the 3rd day of April, 1911, assigned 6 of these Promissory Notes which had not been paid "together with all sums of money due or to become due thereunder or by virtue thereof respectively" to the Plaintiff in consideration of the sum of $27,675 thereupon paid to Seah Jim Huat by the Plaintiff.

The points taken on behalf of the Defendants were, first, that owing to the introduction of the word "personally" in the promissory note Seah Jim Huat had no right or power to assign: secondly, that if he had that right or power the Assignment was not absolute: thirdly, that the payment of the notes was subject to the conditions set out in paragraphs 5, 6, 7, 8 and 9 of the Statement of Defence; while, in answer to paragraphs 3, 4 and 8 of the Reply and Defence to Counterclaim, the Defendants contended that the circumstances disclosed therein worked not estoppel. The Defendants further counterclaimed for a return of the 6 Promissory Notes, a claim which their counsel abandoned at the hearing, substituting for it, a claim for a declaration that the notes are not assignable and should be retained in Court.

With regard to the third point I may say at once that in my opinion the Indian case cited *Ramjeebun Serowgy* v. *Oghur Nath*, 2 Cal. W.N. 188, and the case of *Foster* v. *Jolly*, 4 L.J. (N.S.) EX 65, conclude the matter. As Lord Abinger, C.B., said in the latter case:—"The maker of the note payable on a day certain cannot be allowed to say" I only meant to pay you on a contingency "that is at variance with his own written contract."

With regard to the first point, it was urged by the plaintiff's counsel that there is a distinction between negotiating a Promissory Note which by its terms is non-negotiable and assigning a debt of which that Promissory Note is merely the evidence. In this case Seah Jim Huat had been co-owner with Seah Song Seah of some Land in Muar and there was owing to him by Seah Song Seah $43,000 for his share in the land; it was in respect of this $43,000 that this and the other Promissory Notes were given.

A Bill drawn "pay A" or a note drawn "I promise to pay A" is negotiable although it does not contain the words "or order" *Eddie* v. *East India Co.* (1761) 12 Burr: 1216 and see Bills of Exchange Act 1882, Sec. 8 (4) unless indeed the bill or note contains words prohibiting transfer: in this case the word "personally" was relied on as indicating that the note was not negotiable, and no doubt that word does make it non-negotiable in the sense that Seah Jim Huat was precluded from exercising the rights he would have had under the Act or according to the law merchant.

It was contended however that this left untouched his right to transfer the debt, see Sec. 38 of the Bills of Exchange Act 1882, and Mr. Chalmers' commentary under that Section, viz: "Transmission by Act of Law," and rule 6 thereunder.

As against that contention Mr. Koek cited the cases of *Davies* v. *Davies*, 36 Ch. Div. 359, and *Tolhurst* v. *The Associated Portland Cement Manufacturers, Ltd.*, and *The Imperial Portland Cement Co., Ltd.*, (1903) App. Cases 414 and urged that in each of these cases the contracts were held to be assignable or not according to whether the parties by what they had expressed and in view of the surrounding circumstances, had intended that the contract should be personal or otherwise. In *Davies* v. *Davies* at page 394 of of the report Bowen, L.J., said: "If a contract in its nature and in its true construction is a personal one then it cannot be assigned. The rule of Law is plain you cannot assign the benefit of contracts which are purely personal. I think this is a purely personal covenant and it cannot therefore be assigned and cannot be enforced by the present plaintiffs."

In these cases it may be observed there were no words in the covenant or contract prohibiting or restricting assignment that is to say there were no direct words to indicate that covenant or contract was intended by the parties to be purely personal.

Now the language of the note in our case is "I promise to pay Seah Jim Huat personally." It seems to me as if Seah Song Seah had said to Seah Jim Huat "I owe you $43,000 in respect of this land and I will discharge that debt by giving you these Promissory Notes but it must be

understood that I am to pay them to you yourself." If Seah Jim Huat chose to accept the notes on this consideration there is nothing that I can see to prevent his being bound by it.

Seah Song Seah had no doubt good and sufficient reasons for the restriction he imposed *e.g.*, he may very likely have foreseen that what has happened here, might happen and have desired to prevent it and in my opinion the word "personally" not only has the effect of making the note non-negotiable but also of preventing a valid assignment of the debt in respect of which the notes were given, such at all events appears to me to have been the intention of the parties at the time and as such should be given effect to. I ought not to omit to mention the case of *Brice v. Bannister*, (1878) 3 Q.B.D. page 580, to which Mr. Braddell drew my attention. In that case Brett, L.J., doubted whether a non-negotiable note could be assigned, there being an intention manifest on the instrument that it should not be transferable.

In the view that I take of Seah Jim Huat's right to assign there is no necessity to consider whether the assignment was absolute, but it was contended for the Plaintiff that the Defendants were estopped from disputing this claim for the reasons set out in paragraphs 3, 4 and 8 of the Reply and Defence to the Counterclaim and in support of this contention, some letters which passed between the Solicitors of Seah Song Seah, Seah Jim Huat, the Plaintiff and the Defendants and the Defendants' affidavit for the Collector of Stamps were put in.

It would appear from these documents that the first two Notes were satisfied and the affidavit filed before the Plaintiff took his assignment and it might be argued that the payment of these notes and the filing of the affidavit would estop the defendants from asserting that this debt was due at all. It would not have the effect of estopping them from asserting that the debt was not due to the Plaintiff nor can I see that the advice given by Mr. Emerson of the firm of Sisson & Delay to the Plaintiff that he might take the assignment assuming such advice were given, would estop the defendants, Sisson & Delay having been Solicitors for Seah Song Seah who died in December, 1910, and it now appearing that Messrs. Sisson & Delay were Solicitors for the Defendants.

For these reasons I am of opinion that the action must be dismissed and Judgment entered for the defendants. As for the counterclaim it follows from what I have said that the defendants may have a declaration that the notes are not assignable; but inasmuch as by the Memorandum of Agreement of the 3rd of April, 1911, the Plaintiff had been constituted the Attorney of Seah Jim Huat to collect this debt there can be no order that the notes be retained in Court.

Judgment for Defendants with costs.

Solicitors for Plaintiff—*Braddell Bros.*

Solicitor for Defendants—*E. R. Koek (Sr.)*

[ORIGINAL CIVIL JURISDICTION]

HYNDMAN-JONES, C.J.

April 1, 1912.

[APPELLATE CIVIL JURISDICTION]

FISHER, EBDEN & SPROULE, JJ.

August 7, 1912.

TAN HOOD KENG.....Plaintiff (Appellant)

v.

A. R. P. AROONASALAM CHETTY AND ANOR.....Defendant (Respondent)

[SINGAPORE SUIT No. 124 of 1911]

[SINGAPORE CIVIL APPEAL No. 22 of 1912]

Action for fraudulent representation—Mortgage—Consent order for redemption, effect of—Affirmation of transaction—Estoppel—Election to affirm mortgage.

In 1909 a mortgagor who had prior dealings with a money-lender on account current executed a mortgage to him to secure a definite sum of $175,000 and interest (whereof $173,916 was expressed to be then owing to the mortgagee). On the 30th July 1909 he applied by way of Originating Summons for an order for an account of the amount due under the mortgage and for redemption. In support of his application he filed an affidavit stating *inter alia* (1) that the mortgage has been signed on the faith of the mortgagee's representation that the latter would render him an account of the actual amount due at the date thereof, (2) that only $50,000 or thereabouts was the actual amount owing by him on such date. On the 13th August 1909 an Order was made by consent for the relief claimed, in the common form for redemption. After various proceedings in the action (which included an order by consent for trial of certain issues as to the validity of the mortgage but which order was subsequently set aside as being made without jurisdiction) the Registrar certified the amount due to the mortgagee, on the footing of the validity of the mortgage. The mortgagor applied to vary the certificate but the same was refused. He then commenced an action to set aside the mortgage on the ground of the alleged fraudulent representation of the mortgagee to which the latter *inter alia* pleaded the redemption by way of estoppel:—

Held, that the acts of the mortgagor in applying for and obtaining the Order for redemption of the mortgage constituted a deliberate election on his part not to insist on his right to repudiate the mortgage on the ground of fraud and that he was bound by such election and that on the plea of estoppel the action must be dismissed.

Prior to the 4th July, 1906, Tan Hood Keng had various dealings with A. R. P. Aroonasalam Chitty and had executed equitable mortgages in the latter's favour to secure monies due on account current. On the 4th July, 1906, the said Tan Hood Keng executed a mortgage in favour of the Chitty to secure $175,000 and interest the original mortgages being discharged. The deed stated that the said sum was made up of $173,916 now owing by the mortgagor to the mortgagee